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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION COMPANY, - - Appellant,

vs.

THE SAINT BERNARD MINING COMPANY, - - - Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

OBJECTION TO APPELLANTS STATEMENT OF CASE.

Counsel for appellant in his statement of the case (Brief, p. 1), makes the mistake of assuming that the allegations made in the application to the County Court (R., p. 13), are taken for confessed when, as a matter of fact, the bill denies these allegations and states that it was not brought in good faith. (R., p. 4, 11, p. 2.)

Taking these denials and putting them in the form of affirmative allegations the bill in substance alleges that when it commenced the condemnation proceedings The Madisonville Traction Company was not authorized to build a railroad; that the land sought to be condemned was not necessary for its right of way, and it was not unable to contract with the owners of the land.

STATEMENT.

The Madisonville Traction Company by a proceeding in the Hopkins County Court, hereinafter called the Traction Case, sought to condemn to its use certain land of the St. Bernard Mining Company. The latter company at the proper time filed the proper petition and bond for removal, and removed same as provided by the United States Statutes to the United States Circuit Court for the Western District of Kentucky.

Notwithstanding the removal The Traction Company and the officers of the County Court continued to prosecute and adjudicate said suit. Whereupon the Mining Company filed its bill in equity, praying that the United States Circuit Court enjoin any further prosecution in the County Court of the suit that had been removed and was then pending before said Circuit Court. To this bill the defendant demurred. The court overruled the demurrer and ordered an injunction *pendente lite* upon motion of plaintiff. (R., p. 20.)

Afterward, upon motion of defendants counsel the cause was submitted and judgment rendered. From which this appeal is prosecuted. (R., p. 28).

The court certifies that only one issue was considered in thic injunction suit, The Saint Bernard Mining Company vs. The Madisonville Traction Company it being "whether the court had jurisdiction of this action or to grant the relief prayed for by complainant or any part of it." (R., p. 28.)

ARGUMENT.

I.

We submit that the question of jurisdiction thus raised has no connection with or dependence upon the question whether or not the United States Circuit Court had jurisdiction in the Traction Case. For the latter question could only be raised by direct proceedings in that case.

It has been well settled that notwithstanding the prohibition of the Act of Congress (U. S. Rev. Stat. Sec. 720), a United States Court has a right to enjoin a State Court from interfering with its orders and decrees. *French vs. Hay, 22 Wall., 253; Dietzsch vs. Huidekoper, 103 U. S., 494.*

Mr. Justice Swayne in delivering this opinion of the court in French vs. Hay says:

> "The order of the court below annulling the decree upon which the suit at law in Pennsylvania was founded was fatal to that action and entitled Hoy to a perpetual injunction without reference to the final result of the prior case."

It will be observed that at the time the injunction was granted the "prior case" referred to was still pending.

In *Dietzsch vs. Huidekoper*, Mr. Justice Wood in delivering the opinion of the court says:

> "The court has the right to enforce the judgment against the party defendant and those

whom he represents no matter how or when they may attempt to evade it or escape its effect unless by direct proceedings."

In *Wagner vs. Draket and others, 31 Fed. Rep., 849, District Court S. D. Iowa*, the court deduces from the above decisions the conclusion that when a case is removed to the United States Circuit Court that court has a right to enjoin any further prosecution of it in the State Court, Love J. says: "When a cause is legally removed to a Federal Court all jurisdiction in the State Court is at an end. . . . "No case any longer exists in the State Court." . . . An injunction in such case by the Federal Court restraining the parties before it from proceeding elsewhere is no injunction within the spirit and intent of the statute . . . because after removal there is no proceeding left in the State Court and no jurisdiction to be interfered with." "The United States Supreme Court in *Kern vs. Huidekoper, 103 U. S., 485* decided after the filing in the Circuit Court in a removal case of the record of the proceedings in the State Court, the latter lost all jurisdiction over the case, and being without jurisdiction its subsequent proceedings and judgments are not as some of the courts have ruled simply erroneous but absolutely void.

"In *Insurance Co. vs. Dunn, 19 Wall., 214*, the court says that the Act of Congress providing in such cases that upon proper petition and bond being filed the State Court 'shall proceed no further in the suit,' the further proceedings in the State Court was a clear case of usurped jurisdiction." In *Virginia vs. Rives* the court says that "all proceedings

in the State Court subsequent to the removal are *coram nonjudice* and absolutely void." . . .

"The foregoing decisions leave no doubt whatever of the power of this court to grant injunctions in cases which have been regularly removed from the State Courts."

The conclusion may be fairly drawn from these decisions that when the officers of the County Court after the removal of the Traction case continued to act in it, in the face of the statute providing in such cases the State "shall proceed no further in the suit," they become mere intermeddlers, no longer constituting a court within the meaning of Section 720, and the Circuit Court to which the case had been removed had the right to enjoin any further action in the matter.

II.

As the question of jurisdiction in the Traction case is referred to by the court below and the claim is earnestly urged by counsel for appellants that it affects the question of jurisdiction in this case, it will now be argued.

It is contended that the United States Statutes as amended by Acts of 1887 and 1888 so changed the Act of 1875 as to affect the right of removal in the Traction case and *Hartford & C. W. R. Co. vs. Montague* 92 *Fed. Rep.*, 227 (Circuit Court District Connecticut, May 9, 1891), is cited.

The court in that decision whilst it quoted the Boom case and Searl vs. School District, and expressed the opinion that those cases would not have been so

decided had the amendments of 1887 and 1888 been in force based its decision on the ground that the condemnation proceedings under consideration were different from those passed on in the cases quoted.

In fact the court in both of those cases decided that the condemnation proceedings under advisement each constituted a suit within the meaning of the statute. And it will be noted that the word suit in second section of the present law taken in connection with the first section (R., p. 24) has the same meaning in fixing jurisdiction that it had before the amendments.

III.

It is contended further by counsel for appellant that although some condemnation proceedings might be removed the one under advisement could not be until after an appeal from the County Court to the State Circuit Court, and bases his reasoning on the assumption that the County Court could only act in a purely administrative capacity. The reason would be sound if the assumption were true; but Upshur County vs. Rich cited on page nine of brief does not support this contention but only decides that in taxation proceedings under the laws of West Virginia the County Courts of that state had only administrative jurisdiction.

The section of the constitution of Kentucky cited on page thirteen of brief does not help this contention, for while it provides as a protection to the land owner, that when the case is appealed to the State Circuit Court "the amount of such damages shall be deter-

mined by a jury according to the course of the common law" it does not forbid the legislature to provide for such proceedings before an appeal is taken.

The County Courts of Kentucky act in a capacity sometimes administrative and sometimes judicial as may be prescribed by statute. The Kentucky Statutes Section 1057, gives County Courts jurisdiction over various subjects and in addition "such other jurisdictions as may be conferred by law." That the law has conferred on the County Courts the right to act judicially in condemnation proceedings, will be seen by reference to a decision of the Kentucky Court of Appeals, *Portland & Greenwood Turnpike Co. vs. Robb, 88 Ky., 230*, wherein the court construing a section of the law identical with Section 835 quoted on page two of appellants brief, decides that the necessity of the land sought to be condemned and inability to contract are conditions precedent to the exercise of the right of eminent domain, and further, incidentally, that the County Court is the court of original jurisdiction. Judge Holt in delivering the opinion of the court says:

> "They are judicial facts and should therefore be stated at the out-set. 'They are at the foundation of the proceedings.'" . . .

If these facts should have been stated it follows that they could have been controverted, and therefore judicially determined at the out-set. Hence the court refused to allow these facts to be brought before the Circuit Court on appeal because they had not been alleged before the County Court.

A suit is removable from a state to a United States Circuit Court when the amount in controversy exceeds two thousand dollars; when the suit is of civil nature; and when the defendant is a resident of another state, as provided in supplement to Revised Statues (U. S.) page 611.

In this suit and in the suit of the Madisonville Traction Company against the Saint Bernard Mining Company it is alleged that the latter is a citizen of another state and that the amount in controversy is more than two thousand dollars. This leaves the only question now to be considered whether or not the condemnation proceedings in the Hopkins County Court constituted such a suit of a civil nature as contemplated by the statute above referred to.

It is contended by counsel for appellant that said proceedings could not be removed until after an appeal to the Circuit Court, because to do so would be an interference with the exercise of eminent domain. And they cite in support of this view, 89 U. S., 403 and 124 U. S., 197. We submit that the former is not point; and the reasons given in, neither support such contention. In the case of *Mississippi and Rum River Boom Company* vs. *Patterson*, *89 U. S.*, page 403, the plaintiff was authorized by special act to enter upon and occupy any land necessary for properly conducting its business and where such land was private property to apply to the District Court of County in which it is situated for appointment of Commissioners to appraise its value; and take proceedings for its condemnation; a right of appeal being given to any party interested to District Court.

Upon appeal being taken the case was removed to the United States Circuit Court by authority of a Federal Statute similar to the act now in affect except as to limitation of amount involved.

No question was raised in the District Court except that of compensation and the principle upon which same should be assessed; but the United States Supreme Court where the case taken on writ of error, the question of the jurisdiction of the United States Circuit Court was raised.

It will be observed that in this case the Boom Company was authorized to take the land and no provision was made for judicial inquiry until after appeal to District Court; whereas under our Statute a railroad company can not take land until the County Court has decided that proceedings conform to the law, (Sec. 838 Ky. Statutes,) and not then if exceptions be filed until a trial by jury is had.

The court in the Boom Company case decided that the suit was properly removed because no judicial proceedings were provided for until after appeal to District Court. And decided further that such was not in derogation of the right of eminent domain. And that the right of removal existed where a controversy was raised involving a judicial question.

Mr. Justice Field, in delivering the opinion of the court in discussing the right of eminent domain says:

> "But not withstanding the right is one that appertains to sovereignty when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance."

And in conclusion he says:

> "*And in Gaines vs. Fuentes, 92 U. S. 20*, it was held that a controversy between citizens is involved in a suit whenever any property or claim of the parties capable of pencuniary estimation is the subject of litigation."

The suit of *Union Pacific R. Co. vs. City of Kansas, 115 U. S., 1–25*, was brought to the Supreme Court by the City of Kansas by writ of error to the Circuit Court of the United States for the Western District of Missouri. The City of Kansas commenced condemnation proceedings for widening a street. A trial was had before the Mayor and a jury, and the case was appealed to the Circuit Court of Jackson County, Missouri, before motion was made for removal. The city claimed this was too late. The court decided that it was properly removable because motion was made the first time a judicial question could be raised.

Mr. Justice Bradley in delivering the opinion quotes the Boom case with approval of the decision, and the reason therefor, viz.: *that no removal could be had until a judicial question could be raised.*

Searl vs. School District, 124 U. S. 197 is another case quoted by opposing counsel.

The School District sought to condemn land for school purposes. The Colorado Statutes provide for condemning land by filing petition before County Court or District Court, the judge of which to appoint three commissioners to assess damages. Upon demand of any defendant, a jury of six free

holders to be summoned to fix damages. All of the other proceedings under the Colorado law are almost identical with those under Kentucky statutes except that the latter provide for an appeal to Circuit Court, and the former, only to Supreme Court.

From these decisions it may fairly be concluded that where the other conditions prescribed by the Federal Statutes exist, any action is removable in which a judicial question is pending before a State Court authorized to exercise judicial function in such action.

The Kentucky Statutes provide that a company *authorized to construct a railroad unable* to contract for *necessary* material or *land* may file with the County Clerk a description of property to be taken. And upon application to County Court it shall appoint three commissioners to assess damages. Section 836 provides for commissioners filing report in County Court Clerks office. Section 837 provides that the clerk shall issue process against owners to *show cause*, and to make such orders as to non-residents etc., as provided by Code, for practice in Circuit Court. Section 838 provides that at first term of County Court after owners have been served with process time prescribed by Code before answer is required, it shall be the *duty* of the *court* to *examine* said report and if it *conforms* to the *law* to *confirm*, unless exceptions are filed, in which event the court shall empanel a jury to try the issues of fact made by exceptions. Upon a verdict being rendered if sufficient *cause* be not shown for setting it aside the *court to render judgment* and *make such orders as may be necessary*, either party to

have the right of appeal to Circuit Court, and pending appeal the railroad company to take the land upon payment for same.

It seems that this proceeding in every respect may be regarded as one in which a judicial question was pending before a State Court authorized to exercise judicial functions therein.

The State of Kentucky has delegated the right of eminent domain upon certain conditions precedent. The corporation seeking to exercise it must be *such a one as is authorized to construct a railroad.* It must *be unable to contract*, and the property sought to be condemned must be *necessary.* This certainly opens a judicial inquiry both of law and fact. (Sec. 835.)

Parties are *summoned to show cause.* (Sec. 837.)

It shall be the *duty* of the *court* to *examine* report and *pass* upon the question whether or not it *conforms to law.* If sufficient *cause* be not shown to *set aside verdict*, the court shall *render judgment* and *make such orders as may be necessary.*

If the right of removal is denied, the County Court can pass upon all these questions and may allow a corporation not authorized by law to exercise right of eminent domain to take and do damage of largely more than the value of two thousand dollars to the property of a non-resident of the State of Kentucky.

We insist that it is immaterial in this action whether or not the original action or proceeding was properly removed to the Federal Court as the question of jurisdiction certified by Judge Evans to this court is: "Did the court have jurisdiction to grant the

injunction in *this* action?" Questions of removal and jurisdiction in original proceeding must be decided in due and orderly course of legal procedure *in the Federal Court* in the action in which those questions are or should be directly raised, and if the court goes wrong in deciding them, (from plaintiff view point) then the plaintiff Traction Company can appeal that action.

And it must try these questions in the proceeding in which they arise in their order, in due decorum, and not proceed in defiance of all law in the County Court to wrest the Mining Company's land from its possession and ownership, as it acknowledges and admits, as we charge in our bill, that it attempted to do, and as it would have done but for the injunction herein.

The only proper question in *this* action is "Did the Federal Court have jurisdiction notwithstanding section 720 to restrain the proceedings in the County Court attempted to be had after the original cause had been actually removed to and was pending in the Circuit Court in order to protect it jurisdiction in the removed cause?" If it did not have this power of protecting itself and its jurisdiction, then as a court so far as removed causes are concerned it is a nonentity whose orders command no respect on any hand and the law of removal of causes is ineffectual and unenforceable in any case when the State Court can be led by litigants to disregard it. Surely the authors of section 720 could have intended no such result, and indeed the courts have so held, finding many exceptions from its comprehensive language.

Submitting this to the court we join our learned and ingenious brothers on the other side in discussing

the question of jurisdiction in original action or proceeding. He says our County Court is almost "purely administrative" in its jurisdiction—is an "administrative court" in effect no court but a mere "functionary". —We maintain that if the Traction Company purporting to be an agent of the state can take land from the possession and ownership of the citizen by an *ex parte* proceeding in a non-judicial tribunal, "an administrative court" without notice or summons, on its own unsworn representation that it is the chosen agent of the state, without tendering the citizen a day in court on the question of authority to take, then in that view of the law, which is the one adopted in brief on the other side, such a taking would be and constitute such a deprevation of the property of the citizen without due process of law contrary to the guaranty of the Federal Constitution, as well as the state. Such a taking is just what he says in his brief is contemplated by our Statute.

Go with him further in his argument that the County Court is "an administrative court" and a court only in name and you come to an absurdity. What court—for some court must,—will pass on the jurisdictional facts in case of controversy? Not the County Court for its jurisdiction is administrative, and also because no controversy can there arise as summons is not served on defendent until after the "Legislative Machinery" has been placed in motion, and he is summoned to be heard on the question of amount of damages. Not the Circuit Court, for counsel says it can try no controversy except that as to amount of damages. Where does this leave us? The

allegations of the bill are true and must be accepted as true, as there is no denial by the Traction Company.

The Traction Company's application to the County Court for the appointment of commissioners "was not based on facts and was not brought in good faith". The statements in the application being false, the Traction Company does not possess the power to condemn; yet by his contention this is a trifle. Notwithstanding it does not possess this essential power under the laws of Kentucky, persons calling themselves a Traction Company, not being properly created organized as a railroad corporation, without having attempted to agree with the citizen in a price for his land and without complying with any of the conditions imposed by statute, can come in our County Court, file a false application, not even sworn to, have that "administrative court" "functionary" appoint commissioners, receive their report, summon the citizen to be heard on that report, on the question of amount of damages, render judgment and forthwith take his land, irrevocably, without a judicial hearing.

Surely such was not the intention of any Legislature. The proceeding provided for by the statute while summary was intended to be brought and tried in the County Court as a court, just as a will contest might be or any other case in court, and all questions of law and facts tried out; that court must pass on the question as to whether or not the plaintiff or claimant of such power as an agent of the state is actually such agent and has complied with all necessary conditions attached to the exercise of the power and

had the power delegated to it by the state. This makes a "civil action" a "controversy of a civil nature", nothing more nor less.

And under the elastic federal procedure, which is supposed to conform as nearly as possible to state procedure in the state where the particular Federal Court sits, the proceeding may be begun in that court, and there prosecuted to judgment, provided the citizenship of the parties authorized it.

The point we make is this: The question involved on removal does not touch on the right of the state or its agent to condemn, upon a compliance with the conditions and terms fixed by the state for the exercise of that power, but courts, federal or state, may alike pass on the questions as to whether or not the power is possessed by *a particular agent.* We do not in this case question the existence of the power but we say that so far as the question at issue is concerned, The Madisonville Traction Company is not an agent of the Commonwealth of Kentucky, and does not possess the power of eminent domain, and this court may so find in the discharge of its judicial duty without infringing on the sovereignty of Kentucky in any degree. Nor does the question of expediency of the removal as raised on page twenty-one of brief alter the case. Legal rights must be tried out, and no injustice done to anyone because the railroad company is in a hurry.

We respectfully ask that the decree be sustained; or if that cannot be done that the bill be not dismissed; but the court below be instructed to continue force the injuction *pendente lite* until the Traction case is finally disposed of.

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